No. 12,494

IN THE

United States Court of Appeals

For the Ninth Circuit

F. E. LEITNER, also known as S. F. Leitner, also known as Frederick Leitner, RAPHAEL PORTA and WILLIAM E. BARDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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I.

STATEMENT OF JURISDICTIONAL FACTS.

The complaint, count 1, shows the action to be one brought under Sections 205, 206b and 206c of the Housing and Rent Control Act of 1947, as amended. (Public Law 31, 81st Congress, 1st session.) This Act grants jurisdiction of this type of action to the District Court. The complaint also shows that the defendants were the owners of and operated the apartment house in question and that the apartment house was located in the City and County of San Francisco,

State of California, within the confines of the Southern Division of the Northern District of California. (Record, pages 2, 3.)

The jurisdiction is vested in the United States Court of Appeals by virtue of Section 1291, Title 28, United States Code.

II.

STATEMENT OF THE CASE.

The District Court granted a motion for summary judgment upon the application of the appellee. The position of the appellee was, conceding the truth of the facts alleged in the affidavit of opposition to motion for summary judgment and the answers to interrogatories and demand for admissions, nothing but a question of law remained and judgment should be rendered in favor of appellee.

The affidavit of William E. Barden in opposition to motion for summary judgment shows that one Emmanuel G. Leres, acted as an employee of appellants and appellants' predecessor in interest in the capacity of general manager and handy-man of the apartment house located at 1760-1770 Filbert Street, San Francisco, California, and received as his compensation the use of the apartment 1760-A (R. p. 30); that this employment continued up to the 1st day of July, 1947, and commenced at sometime in 1942. The interrogatories and the answers to demand for admission show that after the 1st day of July, 1947, the apart-

ment was vacated by Mr. Leres and rented to a Mr. and Mrs. Herald Hawkins on the 27th day of December, 1947. (R. pp. 12-18.)

The record also shows that the Court, in addition to granting a motion for summary judgment, struck from the record appellants' interrogatories and demand for admissions. (R. p. 47.)

There are two main questions presented here, first, was the use of the apartment by Emanuel Leres in connection with the services he rendered a rental or a compensation for his services; second, if it be adjudged that the use of the apartment under the circumstances related was compensation for the services of Emmanuel Leres, was the apartment decontrolled by virtue of the provisions of the Housing and Rent Control Act of 1947?

III.

ARGUMENT.

It is fundamental that a summary judgment can only be granted where there is no genuine question of material fact and the sole question remaining is one of law for the Court.

Fartor v. Arkansas Nat'l Gas Corp., 321 U. S. 620, 88 L. Ed. 967;

International Salt Co., Inc. v. U. S., 332 U. S. 392;

Eccles v. Peoples Bank, etc., 333 U. S. 426, 92 L. Ed. 784.

Under the above rule, therefore, the Court was required to take as true the testimony contained in the affidavit of appellants in opposition to the motion for summary judgment. This affidavit showed Emmanuel Leres to have been employed to render certain designated services to appellants and to appellants' predecessors in interest for which he received the use of his apartment.

It is said in *Schumann v. California Cotton Credit Corp.,* 105 Cal. App. 136 at 141:

> "Wage is compensation for services rendered, and this compensation may take the form of money paid or other value given, such as board, lodging or clothes. (18 R.C.L. 530; 39 Cor. Jur. 160; Hancock v. Yaden, 121 Ind. 366, 16 Am. St. Rep. 396, 6 L.R.A. 576, 23 N.E. 253; Moulin v. Columbed, 22 Cal. 508.)"
>
> *Adcock v. Smith,* 37 S.W. 91.

In the case of *Maio v. Borrell,* 83 N.Y.S. (2d) 532, we find the following:

> "(Syl) Where at times superintendent of an apartment house was employed, owner offered him an apartment and a monthly stipend, and superintendent preferred another apartment which owner agreed to let him occupy if monthly stipend was reduced, but there was no express agreement creating tenancy, occupancy of apartment by superintendent was an incident of his employment and conventional relationship of landlord and tenant did not exist."
>
> *Prince v. Davis,* 87 N.Y. Supp. 2nd series 600.

From the foregoing it is apparent, therefore, that under the evidence contained in the affidavit in opposition to motion for summary judgment there was no rental by Leres of the apartment in question. It is also apparent that Leres occupied the apartment for more than twenty-four months continuously after the 1st day of February, 1945.

As to the second question involved, under the terms of the Housing Act of 1947 the term "Controlled Housing Accommodations" does not include any housing accommodations which for twenty-four successive months, that is between February 1, 1945 and March 31, 1947, were not rented other than to members of the immediate family of the landlord as housing accommodations. (50 U.S.C.A. 1892 (c)(3)(b).) Under the provisions of this section of the Act, if the apartment were held vacant, occupied by the landlord, not rented or rented only to the members of the landlord's immediate family, it is not subject to control under the 1947 Act.

This was recognized by rent regulations issued under the Housing and Rent Act of 1947. Subdivision 2(b) of Section 1 of Part 825.10 of these regulations provides as follows:

> "Housing to which this regulation does not apply. This regulation does not apply to the following: * * * to service employees' dwelling space occupied by domestic servants, caretakers, managers, or other employees to whom the space is provided as part or all of their compensation and who are employed for the purpose of rendering services

in connection with the premises of which the dwelling space is a part."

Section 202, Subdivision (c) provides:

"The term 'controlled housing accommodations' means housing accommodations in any defense rental area, except that it does not include— * * * (B) 3(B) which for any successive twenty-four month period during the period February 1, 1945 to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations;"

The crucial word in the above last mentioned section is the word rented. If the housing accommodations were not rented then they were decontrolled and were not subject to the provisions of the Act.

Under the authorities above quoted and cited, there was no renting during the period from 1942 to and including July 1, 1947. On the contrary, there was a payment of wages by the use of the apartment. This period was for a period for more than twenty-four successive months and falls squarely within the last quoted provision of the Act. Therefore the apartment in question was not subject to the provisions of the Act and the motion for summary judgment should have been denied.

A case directly in point coming from the State of New York, is the case of *Prince v. Davis,* 87 N.Y. Supp. 2nd series, 600, commencing with 602. There it was said:

"The landlords have instituted a summary proceeding in this Court in statutory form based upon non-payment of rent by the tenant. The answer is in the form of a general denial coupled with an affirmative defense that 'the rent demanded herein is not that to which the landlord is entitled under the O.H.E. Rent Regulations for housing in the Westchester area.' The facts have been stipulated. It is conceded that the demised premises were occupied by a superintendent in the employ of the landlords or their predecessors in title from June, 1944 to October 11, 1948 and in fact for a period of 12 years prior to October 11, 1948, the enjoyment of the premises being part of the compensation paid to the superintendents. The parties are in agreement that the demised premises were exempt from rent control while so occupied by employees of the landlord to and including October 11, 1948. The position of the tenant, supported by the Office of the Housing Expediter who has appeared in these proceedings by counsel, is that with the termination of the employee occupancy, the premises became subject to rent control.

(1) Implicit in the stipulation of facts is a finding that the premises were not rented for any successive 24 months period during the period February 1, 1945 to March 30, 1948, both dates inclusive. Furthermore, there is nothing in the stipulated facts to establish that the occupancy of the apartment by the employees of the owners of the building at any time between the effective rent date and the date of the commencement of the proceeding was other than part of an employer, employee relationship. There is no proof that the relationship of landlord and tenant ever

existed with respect to these premises prior to the making of the agreement between the landlord and the named tenant in these proceedings. By the language of the Housing and Rent Act of 1947, as amended by Public Law 422, and by the Housing and Rent Act of 1948, 50 U.S.C.A. Appendix, § 1881 et seq. the term 'housing accommodations' refers to a building or the portions thereof 'rented or offered for rent for living or dwelling purposes' Section 202 (b). Since the relationship of landlord and tenant with respect to the demised premises never existed prior to October 12, 1948 when the agreement of tenancy was made with the named tenant in this proceeding, the demised premises clearly were not 'housing accommodations' on the effective rent date in this area.

(2) Furthermore, in defining the term 'controlled housing accommodations' the statute, Section 202(c), expressly excludes any housing accommodations 'which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented * * * as housing accommodations' so that even if, independent of the absence of the relationship of landlord and tenant with respect to the superintendent's apartment, it would be considered 'housing accommodations' under subdivision (b), it clearly is removed from the term 'controlled housing accommodations' in this instance.

(3) Furthermore, this is clearly the first rental undertaken with respect to these premises since the effective rent date in this area, which as such,

is subject to no limitation upon the amount which an owner may ask for the first renting of a housing accommodation after termination of its non-controlled status. Levin v. Rosenkrantz, ... Misc. ....., 86 N.Y.S. (2d) 271, 273; Section 4 Subdivision (c) of Section 825.2 Rent Regulations. In reading Regulation B3 entitled 'Controlled Housing Rent Regulation', including amendments 1 to 32 issued July 1, 1948 we again find in Section 1 Subdivision (b) and then (ii) entitled 'Service Employees', that dwelling space, such as is involved herein, which was occupied by domestic servants as part or all of their compensation, is declared to be exempt housing and in Subdivision (c) of Section 4 of the same regulation we find that 'for controlled housing accommodations first rented on or after July 1, 1947, the maximum rent shall be the first rent for such accommodations.'

With the clear language of the statute before us and with the language of the official interpretation so given, it would seem that there could be no question left to be decided and that the rent established by this first rental agreement after July 1, 1947, should be held to constitute the lawful rent."

The premises in question therefore were clearly decontrolled. The record shows they were rented for the first time on December 27, 1947. Under regulation No. 825.2, they were subject to no limitation upon the amount which the appellants could ask for the first renting and therefore not subject to the action of the appellee housing expediter in this instance.

IV.

CONCLUSION.

We respectfully submit, therefore, that the record in this case discloses that there was a genuine issue as to material facts and that the judgment of the District Court should be reversed with direction that the motion for summary judgment be denied.

Dated, San Francisco, California,
May 17, 1950.

Respectfully submitted,
JOHN F. O'SULLIVAN,
Attorney for Appellants.